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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MICHAEL SCHATZLE, Plaintiff and Appellant, v. INTERINSURANCE EXCHANGE OF THE AUTOMOBILE CLUB OF SOUTHERN CALIFORNIA, Defendant and Respondent.	D073437 (Super. Ct. No. 37-2016-00034916-CU-IC-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Ronald L. Styn, Judge. Reversed.

Miller & Calhoun, Craig A. Miller, and Patrick A. Calhoun for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, Raul L. Martinez, and Celia Moutes-Lee for Defendant and Respondent.

Michael Schatzle had preexisting degenerative disc disease in his spine when he was injured in a motor vehicle accident in 2010. Schatzle's back condition had been

stable for approximately a year and a half before the accident but deteriorated significantly afterwards, causing him pain and requiring him to undergo treatment, including surgery.

After obtaining a policy limits settlement of $100,000 from the driver of the vehicle who struck him, in 2013 he tendered a claim for underinsured motorist benefits under a one million dollar policy issued to him by Interinsurance Exchange of the Automobile Club of Southern California (the Exchange). In 2015, Schatzle demanded arbitration, seeking $900,000 in payment of his claim, representing the one million dollar policy limit less the $100,000 received from the underinsured driver. At arbitration in 2016, the arbitrator awarded Schatzle over $950,000 in damages. The Exchange applied $105,000 in offsets and paid Schatzle over $850,000.

Schatzle then initiated this bad faith action, asserting the Exchange's investigation of his claim was unreasonable and unfairly deprived him of timely payment of benefits due under the policy. In 2017, the Exchange obtained summary judgment based on the "genuine dispute" doctrine, which precludes bad faith liability as a matter of law when it is undisputed or indisputable that the basis for the insurer's denial of benefits was reasonable. (*Wilson v. 21st Century Ins. Co*. (2007) 42 Cal.4th 713, 724 (*Wilson*).)

The sole issue on appeal is whether the trial court properly granted summary judgment for the Exchange on Schatzle's bad faith claim, based on the "genuine dispute" doctrine. We conclude that Schatzle demonstrated there exists a material factual dispute regarding whether the Exchange's investigation of his claim was reasonable and, on that basis, reverse the judgment. In concluding a dispute as to material facts precludes

summary judgment, we express no opinion regarding the ultimate merit of Schatzle's bad faith claim.

BACKGROUND

We take the facts from the record that was before the trial court when it ruled on the Exchange's summary judgment motion. " 'We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party.' " (*Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 347 (*Hampton*).)

A. *Schatzle's Preexisting Back Condition*

Schatzle, a veterinarian, began experiencing back pain in approximately 2007. In 2008, he underwent an MRI of his lumbar spine which indicated a "[l]arge" disc herniation at L4-L5 and a "[m]ild" disc bulge at L5-S1. Dr. Michael Flippin, his physician at the time, reported he "would recommend consideration of surgery only if the patient has no lasting benefit from nonsurgical treatment" and recommended physical therapy and epidural steroid injections in a non-surgical treatment plan. Between March 2007 and April 2009, Schatzle visited medical providers over 20 times regarding his back condition. A follow-up MRI taken in 2009 showed improvement. Between May 2009 and November 10, 2010, he did not see any medical providers for treatment related to back issues; however, he continued to take medication for his back condition. According to Schatzle, he had no back pain in the two- to six-month period preceding the accident.

B. *Motor Vehicle Accident*

On November 11, 2010, Schatzle was injured in a motor vehicle accident when his vehicle was struck from behind by a third party. Schatzle's vehicle was declared a total loss.

The day after the accident, Schatzle was evaluated at urgent care, where he reported experiencing pain in his neck and back because of the impact from the accident. In December 2010, Dr. Sidney Levine diagnosed Schatzle with cervical neck strain and low back strain superimposed on preexisting L4-L5 and L5-S1 disc disease. Dr. Levine opined, "within reasonable medical certainty, Mr. Schatzle did sustain injuries as described above as a result of the motor vehicle accident occurring on 11/11/2010 . . . ."

In March 2011, Dr. Stephen Dorros, a radiologist, conducted an MRI scan of Schatzle's spine. He reported a "left paracentral disc protrusion causing moderately severe left neuro foraminal narrowing and subarticular narrowing at L4-5." Dr. Dorros subsequently reviewed Schatzle's 2008 and 2009 MRI's and noted that, with respect to L4-L5, "the broad based bulge appeared worse than on the previous examination. The disc extrusion had improved since the 2008 examination, but became worse after the . . . 2009 examination." Dr. Levine concurred that the most recent MRI revealed "that the disc extrusion has once again increased in size." Dr. Levine noted, "This does represent an increase in the disc extrusion as compared to the last examination and is consistent with the patient's increase in symptoms following the motor vehicle accident of 11/11/10." Dr. Levine suggested surgical intervention be considered.

Meanwhile, Schatzle had filed an action against the driver of the vehicle that rear-ended him (the *Harris* action). The driver was insured by State Farm with a $100,000 policy limit. In March 2013, State Farm hired a physician, Dr. Richard Ostrup, to perform an independent medical examination of Schatzle. Dr. Ostrup acknowledged that Schatzle "sustained a lumbar and cervical strain" in the accident, but opined that Schatzle's "current complaints of low back pain are more than likely associated with the common history of his preexisting chronic lumbar disc problems that appears to have started around 2007. Such a condition can often wax and wane. At this time, . . . it is unlikely that surgical intervention will help him."

In August 2013, State Farm settled Schatzle's claims in the *Harris* action for the $100,000 policy limit.

C. *Claim for Underinsured Motorist Benefits*

On September 18, 2013, Schatzle made a claim to the Exchange for underinsured motorist benefits.[1]

In March 2014, still under the care of Dr. Levine, Schatzle underwent yet another MRI of his lumbar spine. Dr. Levine recommended both discectomy and lumbar fusion surgeries. Hesitant to undergo major surgery, Schatzle received a second opinion from Dr. Ghosh, who recommended Schatzle undergo the less invasive microdiscectomy and

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1 Schatzle was covered by an automobile policy issued by the Exchange that included underinsured motorist coverage with a $1,000,000 policy limit. The policy provided that, in the event the insured and the insurer disagreed whether the insured is legally entitled to recover damages or on the amount of damages, the "person insured must make a written request to [the Exchange] that the matters in dispute, excluding issues of coverage, be submitted to arbitration."

consider lumbar fusion surgery later if the microdiscectomy was not fully effective. Dr. Ghosh opined, "[t]o a reasonable medical certainty, the motor vehicle accident, dated 11/11/10, resulted in injury to the patient's lumbar spine and herniation of the discs in his lumbar spine giving rise to his lumbar radiculopathy and his need for treatment."

On June 18, 2014, Schatzle provided the Exchange with a demand package previously served in the *Harris* action. This package included medical records supporting payment of the claim, including the 2010 report prepared by Dr. Levine.

In July 2014, Schatzle underwent the microdiscectomy procedure recommended by Dr. Ghosh.

In December 2014, Schatzle provided the Exchange with executed medical authorization forms for ten facilities, pursuant to the Exchange's request.

In April 2015, the Exchange retained Dr. Rachel Gordon to review MRI's taken of Schatzle's lumbar spine in 2008, 2009, 2011, and 2014. In her review, which she provided to the Exchange in June, Dr. Gordon stated that Schatzle had a history of lumbar disc disease since 2008 " 'when he had a large disc extrusion at L4-L5, when [sic] mostly resolved on its own by 2009.' " Reviewing the 2011 lumbar spine MRI, Dr. Gordon noted, "No Change since 2009 MRI." In her summary of findings, she opined that Schatzle's disc disease at L5-S1 was stable in the 2011 MRI after the accident but enlarged on the 2014 MRI. She opined that Schatzle's disc disease was therefore not " 'temporally related' " to the November 11, 2010 accident. Her summary of findings did

not specifically address the condition of Schatzle's spine at L4-L5 during 2009 versus 2011.[2]

In May 2015, Dr. Ghosh reported that, although Schatzle had experienced moderate improvement due to the microdiscectomy, he would need to undergo the lumbar fusion surgery at L4-L5 and L5-S1; he also would need to continue to pursue physical therapy and periodic lumbar facet injections and sacroiliac joint injections for the next 10 years.[3]

D. *Arbitration Demand*

In June 2015, Schatzle made a policy limits demand seeking payment of $900,000, representing the policy limit less the $100,000 Schatzle received in the *Harris* action. Schatzle also demanded arbitration of his claim. The Exchange responded with a letter stating, "We are not rejecting the policy limit demand at this time. However, we need further discovery to properly evaluate Mr. Schatzle's injury claim. This is including, but not limited to: Independent Medical Examinations, Records review, and Mr. Schatzle's deposition."

The Exchange retained Dr. James Bruffey, an orthopedic spine surgeon, to perform an independent medical examination of Schatzle and to conduct a medical records review. After examining Schatzle in November 2015 and reviewing his MRI

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[2] According to Schatzle, the Exchange never informed him during the pendency of his claim that it retained Dr. Gordon, nor did it enter her report into evidence at the arbitration.

[3] It appears Schatzle provided this report to the Exchange in connection with his June 2015 policy limits demand.

films and reports from 2008, 2009, 2011, and 2014, Dr. Bruffey prepared a report dated January 10, 2016, in which he agreed with Dr. Levine's assessment regarding the injuries Schatzle sustained in the November 11, 2010 accident: cervical neck strain and lower back strain superimposed on preexisting L4-L5 and L5-S1 disc disease. Dr. Bruffey opined he "[did] not feel . . . that any significant structural injury to Dr. Schatzle's neck or lower back occurred as a result of this accident." He noted that Schatzle's medical records indicated no change in the dosage or frequency of pain medications provided to Schatzle from June 2009 through April 2012. Dr. Bruffey noted that while Schatzle's 2014 back surgery "was medically indicated and necessary for the symptoms presented to Dr. Ghosh at the time of his 6/4/2014 consultation, it [wa]s medically probable that the need for surgery was related to Dr. Schatzle's pre-existing condition progressing through the normal wear and tear of activities of daily living." Regarding Schatzle's future need for lumbar fusion surgery, Dr. Bruffey opined that, given the lack of any "structural injury" from the accident and the diagnosis of preexisting L4-L5 and L5-S1 degenerative disc conditions, "it is medically probable that this treatment would be related to the progression of that pre-existing condition. It is not medically probable that a lumbar strain—the injury diagnosed that was a direct result of the accident of 11/11/2010—would be treated surgically."

In February 2016, the parties participated unsuccessfully in mediation. In March, the Exchange hired a private investigator to conduct a sub rosa investigation; the investigator surveilled Schatzle over the course of three days and provided a report of his

daily activities. The investigator also attempted to obtain statements from Schatzle's former employees.

In June 2016, the Exchange deposed Drs. Levine, Ghosh, and Flippin. Schatzle deposed Dr. Bruffey. At his deposition, Dr. Ghosh provided a supplemental report opining to a reasonable degree of medical certainty that the 2010 accident caused worsening of the right lumbar herniated nucleus pulposus at L5-S1 and development of a foraminal nucleus pulposus at L4-L5. In a case review report shortly after his deposition, Dr. Ghosh opined that Schatzle's leg pain had improved since his discectomy, but he was still experiencing back pain and, to a reasonable degree of medical certainty, would require lumbar fusion surgery. "The need for lumbar fusion surgery only came about after the subject motor vehicle collision, and never before."

After his deposition, in a supplemental report dated June 23, Dr. Bruffey responded to Dr. Ghosh's supplemental report and opined as follows:

> "After my additional record review, I have not changed my opinion with regards to the diagnosis due to the accident of 11/11/2010 being a lumbar strain. I also feel that the records indicate that Dr. Schatzle has been a surgical candidate for treatment of symptoms related to his degenerative disc conditions since his initial evaluation by Dr. Flippin at Kaiser. He was able to manage those symptoms non-operatively until the symptoms worsened in 2014, and then surgery was elected to treat them at that time. It is not medically probable that a significant injury that occurred on 11/11/2010 in the setting of a pre-existing degenerative disc condition would allow for continued and similar non-operative care modalities to be effective for over 3 years. It is medically probable that the need for surgery and any further surgeries ultimately were due to the natural history of the progression of that pre-existing condition independent of the accident of that date."

In a letter from counsel dated June 29, the Exchange informed Schatzle that, after considering "the additional deposition testimony," Dr. Bruffey "has changed his opinion. . . . [I]n his opinion, only a small percentage (5%) of Dr. Schatzle's post-accident surgical concerns are accident related." Counsel stated that a new report to this effect would be provided; however, our review of the record indicates no further reports were provided.

Prior to arbitration, Schatzle renewed his policy limits demand of $900,000. Based in part on Dr. Bruffey's purported change of opinion, the Exchange increased its pre-arbitration settlement offer to $375,000. In his arbitration brief, Schatzle provided a damages calculation totaling roughly $2.6 million, consisting of $147,137.39 in past medical expenses, $405,000 in future medical expenses, roughly $20,000 in past lost income, $90,000 in future lost income, and $2 million in physical pain, mental suffering and emotional distress.[4]

E. *Arbitration*

The parties proceeded to arbitration in July 2016. Schatzle testified in his own behalf and called as additional witnesses his wife, his mother, and Dr. Ghosh. Schatzle

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4 Over the course of the litigation, Schatzle made a $900,000 offer to compromise (Code Civ. Proc., § 998), a mediation demand of $750,000, and an arbitration demand of $2,662,117.21. According to Schatzle, the Exchange offered him $100,000 at mediation and, shortly before the arbitration, increased its offer to $375,000.

also relied on Dr. Levine's reports. The Exchange called Dr. Bruffey to testify and also relied on Dr. Ostrup's report.[5]

At the arbitration, Dr. Bruffey acknowledged Schatzle's back was strained as a result of the accident. But Dr. Bruffey noted that his "assumption is that this is an all-or-nothing thing where the accident has to be responsible for 100 percent of the need for surgery and 100 percent of the need for a fusion." The arbitrator pointed out that, if the accident was a significant cause of aggravating a preexisting condition, then it was a legal cause of the condition.[6] In response, Dr. Bruffey acknowledged that the lower back strain incurred in the 2010 accident could have aggravated Schatzle's preexisting condition:

> "The Arbitrator: So in our way, if he has—if he's aggravated a preexisting condition—
>
> "[Dr. Bruffey]: Okay. *Which I think a strain does*.
>
> "The Arbitrator: —which is what an accident does, I mean, he's entitled to recover for that aggravation. So if the accident, you know, was a significant cause of, you know, aggravating his condition . . . ." (Italics added.)

Dr. Bruffey was later asked, "And so what do you attribute, then, [t]o Dr. Schatzle's downward plunge beginning in March of . . . 2011?" Dr. Bruffey responded, "Well, I think that there's been a strain injury; so I think there's . . . been an aggravation of his preexisting condition so there's some worsening symptoms."

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5 The Exchange also relied on reports provided by a registered nurse retained to conduct cost analyses of Schatzle's past and future medical care.

6 See, e.g., CACI No. 3927, "Aggravation of Preexisting Condition or Disability," discussed *post*.

In August 2016, the arbitrator issued a decision in Schatzle's favor. The arbitrator described the case as a "classic battle of the medical experts" explaining that "[a]ll the medical experts are competent practitioners qualified to render their medical opinions and this case represents a professional difference of opinion." However, the arbitrator concluded that "the medical opinions on causation given by Drs. Levine and Ghosh are more persuasive than those of Drs. Ostrup and Bruffey." The arbitrator discredited Ostrup's opinion because it was given early on without the benefit of additional MRI's and, contrary to the three other experts, Dr. Ostrup concluded surgical intervention was not indicated. The arbitrator noted that Dr. Schatzle was "a credible witness in all respects" and had not sought medical treatment for his back condition in the 18 months preceding the accident. The arbitrator stated the "most significant" factor in support of his award for Schatzle "is the California civil law on causation which holds that when a claimant's pre-existing medical condition is aggravated by a motor vehicle accident, the tortfeasor is responsible for further injury the claimant suffers if the accident is a substantial factor in causing the additional injury. This is precisely what happened in this case and was confirmed by the Exchange's own medical expert, Dr. Bruffey."

The arbitrator awarded a total of $958,307.39, comprised of $148,307.39 in past medical expenses; $250,000 in future medical expenses; $20,000 in past lost earnings; $40,000 in future lost earnings; and $500,000 in past and future noneconomic damages (pain and suffering). The Exchange offset the award with a $5,000 payment it had previously issued pursuant to the policy's medical payments coverage and the $100,000 Schatzle received in the *Harris* action, and paid Schatzle $853,307.39.

F. *Bad Faith Litigation*

In October 2016, Schatzle filed this lawsuit. The operative complaint asserts a single cause of action for breach of the implied covenant of good faith and fair dealing. The complaint alleged that the Exchange unreasonably or intentionally failed to fully, fairly, impartially, and reasonably investigate Schatzle's claim by ignoring evidence regarding the nature and severity of his injuries and "disregard[ing] strong evidence that Schatzle's prior back condition was dormant, stable, and not requiring of surgery" prior to the accident. The complaint further alleged the Exchange "refused to consider well-established California civil law holding that when a claimant's pre-existing medical condition is aggravated by a motor vehicle accident, the tortfeasor is responsible for further injury the claimant suffers if the accident is a substantial factor in causing additional injury," and thus wrongfully deprived Schatzle of timely payment of his claim.

The Exchange moved for summary judgment, arguing the "genuine dispute" doctrine bars Schatzle's bad faith claim because the Exchange reasonably disputed the cause and extent of Schatzle's injuries and relied on the opinions of experts in doing so. The Exchange argued:

> "Here, the evidence reveals nothing more than a genuine dispute as to the cause and extent of Plaintiff's injuries and the value of Plaintiff's claim. Plaintiff had a long history of lumbar spine problems pre-dating the date of loss by more than three years. More than *two years prior* to the accident, Dr. Flippin recommended that Plaintiff undergo a laminotomy and discectomy if his symptoms persisted despite non-operative treatments—the very same surgery recommended by Dr. Levine after the motor vehicle accident, and which all four physicians agreed was indicated by Plaintiff's symptoms in 2014. Both Dr. Ostrup and Dr. Bruffey opined that Plaintiff's need for surgery—both the July 17, 2014 surgery and

> potential future lumbar fusion—were caused by the natural progression of his pre-existing degenerative disc condition, not the November 11, 2010 accident. Dr. Ostrup and Dr. Bruffey reached these opinions based on their extensive review of Plaintiff's medical records, as well as their own physical examinations of him. Conversely, Dr. Ghosh and Dr. Levine opined that Plaintiff's need for surgery was caused by the motor vehicle accident. An insurer may properly deny a claim based on its reliance on the opinions of experts even when there is substantial disparity between the opinions of the insured's and the insurer's experts. [¶] . . . [¶] Furthermore, not only was there a genuine dispute as to the cause of Plaintiff's injuries, there also existed a genuine dispute as to the amount of his damages. The significant discrepancy between Plaintiff's demand in the amount of more than $2.6 million and the actual arbitration award of approximately $950,000 proves the existence of a genuine dispute."

In response, Schatzle argued that the genuine dispute doctrine does not apply where the insurer fails to conduct a thorough investigation or fails to maintain its position in good faith and on reasonable grounds. Schatzle argued the following facts supported inferences the Exchange's investigation was unreasonable: the Exchange failed to inform Dr. Bruffey of the appropriate causation standard; the Exchange ignored the independent medical opinion of Dr. Dorros, who performed the 2011 MRI and analyzed the prior 2008 and 2009 MRI's; the Exchange falsely propagated the notion that Dr. Flippin recommended that Plaintiff undergo spinal surgery two years before the accident when he only warned surgery might be necessary if other treatments were not successful, but they were; the Exchange's claims representative was not fully truthful in deposition; the Exchange's claims representative predicted from the outset the claim would end up in litigation; the Exchange set an unreasonably low claim reserve at $22,000; the Exchange relied on the opinion of Dr. Ostrup, a "defense doctor" whose opinion was purportedly

"rejected" by State Farm in the *Harris* action;[7] and the Exchange hired a private investigator to conduct sub rosa surveillance.

After a hearing, the trial court granted the Exchange's motion for summary judgment, finding the Exchange's reliance on the opinions of Dr. Ostrup, Dr. Gordon, and Dr. Bruffey established a genuine dispute as to the cause of Schatzle's injuries: the preexisting condition or the 2010 motor vehicle accident. The trial court rejected Schatzle's argument that the Exchange failed to conduct a reasonable investigation, finding Schatzle submitted no evidence to establish the investigation was unreasonable. The court noted that the Exchange was not required to accept the opinion of Dr. Dorros and was within its rights to investigate the basis for Schatzle's claim by asking Dr. Gordon to examine Schatzle's MRI's and offer an opinion. The court found that Schatzle's proffered evidence regarding Dr. Flippin, the claims representative's statements, the Exchange's claim reserves, and the Exchange's hiring of an investigator, failed to establish the Exchange's investigation was unreasonable. The court found no evidence supported Schatzle's contention State Farm "rejected" Dr. Ostrup's opinions by deciding to settle the *Harris* lawsuit. The court found Schatzle failed to produce evidence sufficient to establish that the Exchange misrepresented its investigation and failed to provide authority to support its argument that the Exchange was required to inform Dr. Bruffey of the appropriate legal standard. The court concluded Schatzle failed

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[7] In a deposition, the Exchange's Irma Fernandez described Dr. Ostrup as "a doctor that is retained by counsel, defense counsel." Schatzle argues that, in settling so soon after obtaining Dr. Ostrup's report, State Farm "rejected" Dr. Ostrup's opinion.

to provide evidence to support a finding that the Exchange's reliance on its experts' opinions was unreasonable.

The trial court entered judgment in favor of the Exchange; Schatzle timely appealed and now reasserts many of the arguments he raised in opposition to summary judgment.

DISCUSSION

I.

Summary Judgment, Bad Faith, and the Genuine Dispute Doctrine

A trial court properly grants a motion for summary judgment only if no issues of triable fact appear and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) " 'The moving party bears the burden of showing the court that the plaintiff "has not established, and cannot reasonably expect to establish," ' the elements of his or her cause of action." (*Zubillaga v. Allstate Indemnity Co*. (2017) 12 Cal.App.5th 1017, 1026 (*Zubillaga*).) " ' " ' "We review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained." ' [Citation.] We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party." ' " (*Hampton, supra,* 62 Cal.4th at p. 347.)

"The law implies in every contract, including insurance policies, a covenant of good faith and fair dealing. 'The implied promise requires each contracting party to refrain from doing anything to injure the right of the other to receive the agreement's

benefits. To fulfill its implied obligation, an insurer must give at least as much consideration to the interests of the insured as it gives to its own interests. When the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort.' " (*Wilson*, *supra*, 42 Cal.4th at p. 720.)

"While an insurance company has no obligation under the implied covenant of good faith and fair dealing to pay every claim its insured makes, the insurer cannot deny the claim 'without fully investigating the grounds for its denial.' [Citation.] To protect its insured's contractual interest in security and peace of mind, 'it is essential that an insurer fully inquire into possible bases that might support the insured's claim' before denying it. [Citation.] By the same token, denial of a claim on a basis unfounded in the facts known to the insurer, or contradicted by those facts, may be deemed unreasonable. 'A trier of fact may find that an insurer acted unreasonably if the insurer ignores evidence available to it which supports the claim. The insurer may not just focus on those facts which justify denial of the claim.' " (*Wilson*, *supra*, 42 Cal.4th at pp. 720-721.)

Indeed, in *Egan v. Mutual of Omaha Insurance Company* (1979) 24 Cal.3d 809, our Supreme Court emphasized that, to protect the interests of its insured, it was "essential that an insurer *fully* inquire into *possible* bases that *might* support the insured's claim." (*Id*. at p. 819, italics added.) Moreover, " '[W]hen benefits are due an insured, "delayed payment based on inadequate or tardy investigations, oppressive conduct by claims adjusters seeking to reduce the amounts legitimately payable and numerous other tactics may breach the implied covenant because" they frustrate the insured's right to

receive the benefits of the contract in "prompt compensation for losses." ' " (*Brehm v. 21st Century Ins. Co*. (2008) 166 Cal.App.4th 1225, 1236.)

"[A]n insurer denying or delaying the payment of policy benefits due to the existence of a *genuine dispute* with its insured as to the existence of coverage liability or the amount of the insured's coverage claim is not liable in bad faith even though it might be liable for breach of contract." (*Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co*. (2001) 90 Cal.App.4th 335, 347, italics added (*Chateau Chamberay*).) "This 'genuine dispute' or 'genuine issue' rule was originally invoked in cases involving disputes over policy interpretation, but in recent years courts have applied it to factual disputes as well." (*Wilson*, *supra*, 42 Cal.4th at p. 723.)

"The genuine dispute rule does not relieve an insurer from its obligation to thoroughly and fairly investigate, process and evaluate the insured's claim. A *genuine* dispute exists only where the insurer's position is maintained in good faith and on reasonable grounds. [Citations.] Nor does the rule alter the standards for deciding and reviewing motions for summary judgment. 'The genuine issue rule in the context of bad faith claims allows a [trial] court to grant summary judgment when it is undisputed or indisputable that the basis for the insurer's denial of benefits was reasonable—for example, where even under the plaintiff's version of the facts there is a genuine issue as to the insurer's liability under California law. [Citation.] . . . On the other hand, an insurer is not entitled to judgment as a matter of law where, viewing the facts in the light most favorable to the plaintiff, a jury could conclude that the insurer acted unreasonably.' " (*Wilson*, *supra*, 42 Cal.4th at pp. 723-724, fn. omitted.)

"Thus, an insurer is entitled to summary judgment based on a genuine dispute over coverage or the value of the insured's claim only where the summary judgment record demonstrates the absence of triable issues (Code Civ. Proc., § 437c, subd. (c)) as to whether the disputed position upon which the insurer denied the claim was reached reasonably and in good faith." (*Wilson, supra,* 42 Cal.4th at p. 724.)

"When determining if a dispute is genuine, we do 'not decide which party is "right" as to the disputed matter, but only that a reasonable and legitimate dispute actually existed.' " (*Zubillaga, supra,* 12 Cal.App.5th at p. 1028.) A dispute is legitimate if "it is founded on a basis that is reasonable under all the circumstances." (*Wilson, supra,* 42 Cal.4th at p. 724, fn. 7.) " 'This is an *objective* standard.' " (*Zubillaga,* at p. 1028.) "Moreover, the reasonableness of the insurer's decisions and actions must be evaluated as of the time that they were made; the evaluation cannot fairly be made in the light of subsequent events that may provide evidence of the insurer's errors." (*Chateau Chamberay, supra,* 90 Cal.App.4th at p. 347.)

II.

Schatzle's Eggshell Plaintiff Theory

The Exchange does not dispute that Schatzle was injured in the car accident. Rather, the Exchange contends that Schatzle's need for continued injections and multiple surgeries was attributable not to the car accident, but to the natural progression of his preexisting degenerative back condition. Schatzle concedes he had a preexisting back condition but claims his condition was stable and improving prior to the accident. He

contends (and the arbitrator agreed) the accident significantly aggravated his condition, and thus was the legal cause of his current injuries.

"Plaintiff may recover to the full extent that his condition has worsened as a result of defendant's tortious act." (*Ng v. Hudson* (1977) 75 Cal.App.3d 250, 255 (*Ng*), overruled on another ground in *Soule v. General Motors Corp*. (1994) 8 Cal.4th 548, 574.) Witkin explains the so-called "eggshell plaintiff" theory as follows:

> "[W]hen an actor's tortious conduct causes harm to a person that, because of a preexisting physical or mental condition or other characteristics of the person, is of a greater magnitude or different type than might reasonably be expected, the actor is nevertheless subject to liability for all such harm to the person." (6 Witkin, Summary of Cal. Law (11th ed. 2018) Torts, § 1343, p. 649.)

"It is no defense that plaintiff was in a preexisting weakened condition or 'unusually susceptible' to injury: Defendants are liable for all damages legally caused by their tortious acts even though the injured plaintiff had a preexisting condition that made the consequences of the tortious acts more severe than they would have been for a 'normal' victim." (Haning et al., Cal. Practice Guide: Personal Injury (The Rutter Group 2018) ¶ 3:388, italics omitted.) The Rutter Guide further explains the "preexisting injury defense," as follows:

> "Plaintiff's alleged 'preexisting condition' may have been caused by a previous injury . . . in which case the defense may argue that the prior injury was the 'legal cause' of plaintiff's current damages. This defense may be refuted through medical reports or testimony that plaintiff fully recovered from the prior injury; or, again, by showing that defendant's conduct aggravated a preexisting condition for which defendant must be held liable. (*Id*., ¶ 3:389, italics omitted.)

The eggshell plaintiff principle is embodied in the civil jury instructions promulgated by the Judicial Council of California. CACI No. 3927, "Aggravation of Preexisting Condition or Disability," provides that a plaintiff "is not entitled to damages for any physical . . . condition that [he] had before [defendant's] conduct occurred. However, if [plaintiff] had a physical . . . condition that was made worse by [defendant's] wrongful conduct, you must award damages that will reasonably and fairly compensate [him] for the effect on that condition." CACI No. 3928, "Unusually Susceptible Plaintiff," further provides that the jury "must decide the full amount of money that will reasonably and fairly compensate [plaintiff] for all damages caused by the wrongful conduct of [defendant], even if [plaintiff] was more susceptible to injury than a normally healthy person would have been, and even if a normally healthy person would not have suffered similar injury."

III.

Analysis

Schatzle argues summary judgment was improper because there is evidence creating a dispute of material fact as to whether the Exchange's reliance on Dr. Bruffey's opinion was reasonable, and if not, whether the Exchange's investigation of Schatzle's claim was incomplete and flawed:

> "It was the Exchange's job to ensure the claim was handled fairly, in conformance with the duties of good faith and fair dealing. Surely encompassed within this fairness standard is an active effort to ensure that the Exchange's sole testifying expert comprehend the effect of causation on an eggshell plaintiff. . . . ¶ Moreover, the genuine dispute doctrine does not apply where an insurer's expert is unreasonable, or where the insurer does not fairly investigate,

> process and evaluate the insured's claim. [Citations.] The Exchange's failure to choose an expert versed on the applicable causation standard, or educate its retained expert on the fundamental issue upon which the case turned, means that its medical investigation was incomplete and flawed, and that its expert was unreasonable. In short, the Exchange had no business relying upon Dr. Bruffey's opinion. On this [basis] alone, there is a genuine issue of fact whether there is a genuine dispute in this case."

To show the Exchange's claim investigation was unreasonable, Schatzle points to evidence establishing that, at the time of the arbitration, Dr. Bruffey appears to have misunderstood the applicable causation standard because he assumed causation was an "all-or-nothing" proposition:

> "I look at this, try to be very objective when I look at these records, and try and say, okay, if he's been injured in something—And, again, I have to look at it as—because I've kind of been—my assumption is that this is an all-or-nothing thing where the accident has to be responsible for 100 percent of the need for surgery and 100 percent of the need for a fusion. Now, let's go all the way to where it ends up. ¶ And that's where I wrestle with it, because I've got a guy who's clearly symptomatic that predated."

Notably, when the arbitrator explained that the Exchange could be liable if the accident aggravated Schatzle's preexisting condition, causing his current injuries, Dr. Bruffey readily agreed that the strain caused by the accident aggravated Schatzle's condition.[8]

The Exchange disputes Dr. Bruffey misunderstood the standard. We therefore compare the standard he articulated to the governing standard for analyzing causation. California has adopted the "substantial factor" test in analyzing causation. (*Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1050-1053.) "A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm." (CACI No. 430.) " 'The substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical.' " (*Uriell v. Regents of Univ. of Cal.* (2015) 234 Cal.App.4th 735, 744, quoting *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 978.) Dr. Bruffey's statements suggest he was either unaware of, or misapplied, this broad standard of

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8 The Exchange made broad evidentiary objections to the evidence Schatzle submitted to the trial court, including the arbitration transcripts, and renews many of those objections on appeal. The trial court accepted a late-filed attorney declaration authenticating Plaintiff's documents and overruled all the Exchange's objections. The Exchange has not demonstrated the trial court erred in overruling its objections to Dr. Bruffey's testimony at arbitration. (See, e.g., Code Civ. Proc., § 437c, subds. (b) & (d); *Williams v. Saga Enterprises, Inc.* (1990) 225 Cal.App.3d 142, 149, fn. 3 [transcript of testimony from separate proceeding admissible to support opposition of summary judgment motion because it "serves effectively as a [witness] declaration" even if it does not qualify squarely under Evid. Code, § 1292]; see also *Sweetwater Union High School Dist. v. Gilbane Building Co.* (2019) 6 Cal.5th 931, 1158-1159 [citing *Williams* analysis with approval in context of anti-SLAPP (strategic lawsuit against public participation) action].)

causation. He assumed the accident had to be "100 percent" responsible for Schatzle's injuries and his need for surgery, emphasizing it was an "all-or-nothing" exercise. Contrary to Dr. Bruffey's assumptions, a "plaintiff need not prove that the defendant's negligence was the *sole* cause of plaintiff's injury in order to recover. Rather, it is sufficient that defendant's negligence is *a* legal cause of injury, even though it operated in combination with other causes, whether tortious or nontortious." (*Logacz v. Limansky* (1999) 71 Cal.App.4th 1149, 1158, first italics added.) Viewing Dr. Bruffey's statements in the light most favorable to Schatzle (*Hampton*, *supra*, 62 Cal.4th at p. 347), as we must, we conclude they support an inference that the expert's understanding of causation was inconsistent with California law.

The Exchange argues that it had no duty to inform its expert of the appropriate legal standard of causation and that Schatzle cites no authority supporting such a duty. We believe the Exchange is construing its duties too narrowly here. "A *genuine* dispute exists only where the insurer's position is maintained in good faith and on reasonable grounds." (*Wilson*, *supra*, 42 Cal.4th at p. 723.) There is no question an expert's theory must be reasonable: " 'An expert opinion has no value if its basis is unsound.' " (*Sargon Enterprises, Inc. v. Univ. of Southern Cal.* (2012) 55 Cal.4th 747, 770.) Case law therefore makes clear that although an insurer may deny a claim based on the opinion of experts (*Fraley v. Allstate Ins. Co*. (2000) 81 Cal.App.4th 1282, 1292), "an expert's testimony will not *automatically* insulate an insurer from a bad faith claim." (*Zubillaga*, *supra*, 12 Cal.App.5th at p. 1028.) The Exchange "is not entitled to judgment as a matter of law where, viewing the facts in the light most favorable to [Schatzle], a jury could

conclude that the insurer acted unreasonably." (*Zubillaga*, at p. 1030; see *Chateau Chamberay*, *supra*, 90 Cal.App.4th at p. 346 [application of genuine dispute doctrine "becomes a question of law where the evidence is undisputed and only one reasonable inference can be drawn from the evidence"].) Applying these principles here, a jury could conclude the Exchange's primary expert fundamentally misunderstood or misconstrued basic governing standards for evaluating causation, the Exchange ignored this information in bad faith, and the Exchange's treatment of Schatzle's claim was not "full, fair and thorough." (*Bosetti v. United States Life Ins. Co. in City of New York* (2009) 175 Cal.App.4th 1208, 1237 ["[a]n insurer cannot claim the benefit of the genuine dispute doctrine based on an investigation or evaluation of the insured's claim that is not full, fair and thorough"]; see *Chateau Chamberay*, at pp. 348-349 [a biased investigation may be shown where "the insurer's experts were unreasonable"]; *Wilson*, at p. 721 [insurer acts unreasonably where it ignores evidence available to it which supports the insured's claim].)

The Exchange further argues "Plaintiff's eggshell plaintiff theory confuses causation with aggravation of a pre-existing condition," but we do not believe this is an accurate assessment of Schatzle's claims. Schatzle makes clear his claim is premised on Dr. Bruffey's erroneous understanding of *causation* principles, explaining for example that "the Exchange's sole testifying expert" did not "comprehend the effect of causation on an eggshell plaintiff." Schatzle's position was that "the accident exacerbated a *dormant* preexisting condition *and caused* the need for surgery." (Italics added.) Schatzle is not confusing or ignoring the threshold requirement of proving causation, but

rather Schatlze contends he is entitled to damages for the *aggravation* of a preexisting condition *caused by* the accident. Schatzle contends the accident caused the aggravation of his condition—i.e., that it was a substantial factor in harming him and necessitating surgery—and that he should be compensated for the full extent of his resulting injuries. (See, e.g., *Ng*, *supra*, 75 Cal.App.3d at p. 255 ["[A] tortfeasor may be held liable in an action for damages where the effect of his negligence is to aggravate a preexisting condition or disease. Plaintiff may recover to the full extent that his condition has worsened as a result of defendant's tortious act."]; *Rideau v. Los Angeles Transit Lines* (1954) 124 Cal.App.2d 466, 471 ["A plaintiff is entitled to recover for the aggravation of a physical condition. [Citations.] The tort feasor takes the person he injures as he finds him. If, by reason of some preexisting condition, his victim is more susceptible to injury, the tort feasor is not thereby exonerated from liability."].)

To summarize, viewing the evidence in the light most favorable to Schatzle, a jury could conclude that the Exchange acted unreasonably in its investigation by relying on the opinion of an expert who misunderstood the causation standard in a manner that disfavored the insured and by simultaneously disregarding evidence favorable to the insured. Under the circumstances of this case, it was for a trier of fact to decide "whether the disputed position upon which the insurer denied the claim was reached reasonably

and in good faith." (*Wilson, supra*, 42 Cal.4th at p. 724.) The Exchange therefore is not entitled to summary judgment based on the "genuine dispute" doctrine.[9]

The determination the Exchange is not entitled to summary judgment under the "genuine dispute" doctrine likewise necessitates reversal of the trial court's corollary decision that, in the absence of a viable cause of action, Schatzle is not entitled to punitive damages. (See *Morris v. Paul Revere Life Ins. Co*. (2003) 109 Cal.App.4th 966, 977 [an insurer that denies benefits unreasonably may be exposed to the full array of tort remedies, including potential punitive damages].)

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9 Schatzle proffers additional evidence he contends bolsters his claim of bad faith: the decision not to use Dr. Gordon's report during the arbitration, the purported defense bias of Dr. Ostrup, the hiring of a private investigator to surveil Schatzle, the setting of low claims reserves, and the Exchange's predisposition to litigate Schatzle's claim rather than settle. Having determined that Schatzle has established the existence of a material fact precluding summary judgment for the reasons stated *ante*, we need not address these additional points.

DISPOSITION

The judgment is reversed. Schatzle is entitled to costs on appeal.

GUERRERO, J.

WE CONCUR:

BENKE, Acting P. J.

DATO, J.